

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AZIZ AND ZAKIA KHAN</b>	:	ORDER
	:	DTA NO. 825136
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 2005 through 2007.	:	
	:	

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Petitioners, Aziz and Zakia Khan, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2005 through 2007.

On August 23, 2012, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 22, 2012, petitioner Aziz Khan, appearing pro se, submitted written comments in opposition to dismissal. On October 22, 2012, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), having been granted a 30-day extension to do so, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on October 22, 2012. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioners timely filed their petition with the Division of Tax Appeals following the issuance of a Notice of Deficiency.

***FINDINGS OF FACT***

1. On July 19, 2012, petitioners, Aziz and Zakia Khan, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review assessment number L-033407612.

Petitioners did not attach a copy of a statutory notice to their petition as required, but did attach a Response to Taxpayer Inquiry dated June 18, 2012, that referred to L-033407612.

2. Assessment number L-033407612 relates to a Notice of Deficiency dated March 8, 2010 and addressed to petitioners at a Dix Hills, New York, address.

3. On August 23, 2012, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of a Notice of Deficiency issued to petitioners on March 8, 2010 and that the petition was not filed until July 19, 2012, or some 864 days later.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Deficiency under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated October 17, 2012, of Daniel A. Maney, a manager in the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 8, 2010; (iii) an affidavit, dated October 17, 2012, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; and (iv) a copy of petitioners' jointly filed 2003, 2008, and 2010 New York resident income tax returns, each of which reports the same Dix Hills, New York, address for petitioners as that listed on the subject Notice of Deficiency.

5. The petition filed in this matter also reports the same Dix Hills, New York, address for petitioners as that reported on the subject Notice of Deficiency and the 2003, 2008, and 2010 New York resident income tax returns submitted by the Division.

6. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced (or run) approximately 10 days in advance of the anticipated date of mailing and the date (and time) of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "3/8/10." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

7. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

8. The CMR relevant to the Notice of Deficiency under protest consists of 19 pages and lists 202 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated March 8, 2010 to each page of the CMR and also wrote his or her initials on each page thereof.

9. Page 5 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 1786 6299 and assessment number L-033407612, was mailed to petitioners at the Dix Hills, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioners' names and address as noted.

10. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. The mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contains such postmarks and initials. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the

number on the last page of the CMR. Here, the USPS employee complied with this request by writing the number “202” on the last page next to his or her initials.

11. According to both the Maney and Peltier affidavits, a copy of the subject Notice of Deficiency was mailed to petitioners on March 8, 2010, as claimed.

12. In their petition, petitioners state that the assessment under protest “seems to be a derivative” of a sales tax assessment against an entity called 492 Fast Food, Inc., and they deny responsibility for running that business. The petition, however, expressly protests personal income tax assessment number L-033407612 and makes no reference to any other assessment number.

13. In comments filed in response to the Notice of Intent to Dismiss, petitioners again refer to a sales tax assessment against 492 Fast Food, Inc., and deny that either was a responsible officer of that corporation for sales tax purposes. Petitioners also note their understanding that because another alleged responsible officer filed a protest of the sales tax assessments they were not required to petition the sales tax assessment.

14. Also in their comments, petitioners refer to an assessment numbered L-030504127, and request that this assessment also be reviewed.

### ***CONCLUSIONS OF LAW***

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order

because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). Where a notice of deficiency has been properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject Notice of Deficiency was mailed as addressed to petitioners on March 8, 2010. Specifically, this document lists certified control numbers with corresponding names and addresses and bears USPS postmarks on each page, dated March 8, 2010. Additionally, a postal employee wrote “202” on the last page of the CMR next to his or her initials to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly

completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. The 90-day period for filing a petition in this matter thus commenced on March 8, 2010. The petition was filed on July 19, 2012, well-beyond the 90-day period of limitations, and was thus untimely. Accordingly, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition (as noted in Findings of Fact 12 and 13).

G. Regarding petitioners' request, in their comments filed in response to the Notice of Intent to Dismiss, that an assessment numbered L-030504127 also be reviewed (*see* Finding of Fact 14), as noted, the petition in this matter refers only to assessment number L-033407612. The petition makes no reference to any other assessment number, and petitioners attached no documents referring to any other assessment numbers. Accordingly, assessment number L-030504127 may not be considered as part of the petition at issue in this matter (*see Matter of Pacori*, Tax Appeals Tribunal, November 20, 2008).

H. The petition of Aziz and Zakia Khan is hereby dismissed.<sup>1</sup>

DATED: Albany, New York  
December 20, 2012

/s/ Timothy Alston  
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ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> Petitioners may not be without some remedy, for they may pay the disputed tax and file a claim for refund (Tax Law § 687). If the refund claim is disallowed, petitioners may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).